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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VICTOR LINDZY,

Plaintiff and Appellant,

v.

Q-RAILING USA CO.,

Defendant and Respondent.

G047343

(Super. Ct. No. 30-2012-000542450)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Alireza Alivandivafa for Plaintiff and Appellant.

Murtaugh Meyer Nelson & Treglia, Michelle R. Berger and Ian J. Pittluck for Defendant and Respondent.

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Plaintiff Victor Lindzy appeals from the order granting defendant Q-Railing USA Company's special motion to strike his complaint alleging unfair competition, intentional interference with prospective economic relations, and declaratory relief. (Code Civ. Proc., § 425.16; all further statutory references are to this code unless otherwise stated.) He contends defendant did not establish "the challenged cause[s] of action arises from a protected activity" and even if it did, he demonstrated "a probability [of] prevail[ing] on his claims."

We initially note plaintiff's opening brief fails to provide a summary of the relevant facts with citations to the record in violation of California Rules of Court, rules 8.204(a)(1)(C) and 8.204(a)(2)(C). "A violation of the rules of court may result in the striking of the offending document, the waiver of the arguments made therein, the imposition of fines and/or the dismissal of the appeal. [Citations.] . . . The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

Plaintiff also failed to include defendant's moving and reply papers in the clerk's transcript, making it difficult to "review the basis of the court's decision." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) Based on the totality of the record, however, we have been able to piece together the relevant facts of the case and the basis of defendant's motion to strike. Having done so, we find no merit to plaintiff's arguments and affirm the order granting the motion.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff previously worked for defendant. In connection with his employment, he signed a "[n]ondisclosure/[c]onfidentiality" agreement (confidentiality agreement) dated March 22, 2010, pledging not to disclose confidential information,

including customer lists, financial information, marketing strategies, and research and development strategies. A month later, he was terminated for violating company policy.

On April 22, 2010, plaintiff signed a “Severance Agreement and Release” (severance agreement) in exchange for a \$3,500 severance payment, which was intended “to resolve any and all claims which may potentially arise from said job reduction” Plaintiff agreed to release defendant from all claims, known and unknown, and not to sue defendant for any purpose other than to enforce or construe the agreement.

After his termination from defendant’s company, plaintiff became a salesman for Rami Designs, Inc. (Rami), another company in the same trade as defendant. He began soliciting customers on defendant’s confidential client list and disparaged defendant’s name to at least one of these customers. On May 17, 2010, defendant’s attorney sent a letter to plaintiff and Rami demanding they “cease and desist any further disclosure of [defendant’s] proprietary information and any solicitation of [its] clients” and warning it would seek damages including attorney fees if it became aware of any further violations.

In February 2012, plaintiff sued defendant for unfair competition in violation of Business and Professions Code section 17200 et seq., intentional interference with prospective economic relations, and declaratory relief. He alleged that “[a]s a result of [defendant’s] illegal action [i.e., sending a letter threatening to sue him and Rami if he “engaged in work for Rami”], [he] was denied employment and terminated from Rami . . . and has not been able to work in his chosen field since this illegal interference took place.”

Defendant moved to strike the complaint on the ground it constituted a Strategic Lawsuit Against Public Participation, or SLAPP, in violation of section 425.16 (anti-SLAPP motion) because it arose from an act in furtherance of defendant’s right to petition and plaintiff could not carry his burden of establishing a probability he would prevail. Plaintiff opposed the motion, arguing defendant had “not established that any of

its activities . . . were actually legal” because they were based on defendant’s attempts to enforce illegal non-compete and non-solicitation clauses, and even if it had made that showing, he demonstrated a probability of prevailing on his claims. The court disagreed and granted the motion, finding the letter was “protected activity since it is a prelitigation communication referring to ‘an issue under consideration or review by a . . . judicial body’” and that plaintiff failed to carry his burden to show he was likely to prevail on his claims because none of the documents on which he relied “constitute a non-solicitation agreement” or “promise not to compete.”

DISCUSSION

1. Introduction

Under section 425.16, subdivision (b)(1), a cause of action against a person arising from an act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff establishes the probability of prevailing on the claim. The statute “requires the court to engage in a two-step process: First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

We review the court’s ruling de novo, considering ““the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.”” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. Protected Activity

Plaintiff contends defendant failed to show “the challenged cause[s] of action [arose] from a protected activity.” We disagree.

With regard to this step of the anti-SLAPP analysis, “the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)’” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Under section 425.16, subdivision (e), an act in furtherance of a person’s right of petition or free speech includes, in pertinent part: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law”

“There is no question that ‘a prelitigation statement falls within clause (1) or (2) of section 426.16, subdivision (e) if the statement “‘concern[s] the subject of the dispute’ and is made ‘in anticipation of litigation “contemplated in good faith and under serious consideration[.]”’”” (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1162; see also *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268 (*Neville*)). In *Neville*, an employer brought a contract and trade secrets action against a former employee. The employee cross-claimed that a letter sent by the employer’s lawyer before filing the lawsuit to customers was defamatory. *Neville* held that it made no difference to the outcome that the letter had been sent before the employer brought the lawsuit against the former employee. (*Id.* at p. 1268.) According to *Neville*, “[t]his position reflects that ‘courts have adopted “a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.” [Citation.]’ [Citation.] Accordingly, although litigation may not have commenced, if a statement ‘concern[s] the subject of the

dispute’ and is made ‘in anticipation of litigation “contemplated in good faith and under serious consideration,”’ [citations] then the statement may be petitioning activity protected by section 425.16.” (*Ibid.*)

Here, plaintiff based all three of his causes of action on the May 17, 2010 letter from defendant’s attorney demanding plaintiff and Rami “cease and desist any further disclosure of [defendant’s] proprietary information [i.e., defendant’s confidential customer lists] and any solicitation of [defendant’s] clients” and warning defendant would seek damages including attorney fees and equitable remedies for any further violations of the confidentiality agreement and the severance agreement. The complaint’s factual allegations assert that as a result of defendant’s “illegal action” in sending the letter, he “was denied employment and terminated from Rami . . . and has not been able to work in his chosen field since this illegal interference took place.” In the first cause of action for unfair competition, plaintiff alleges that “[a]s a proximate result of [d]efendant[’s] actions [i.e., sending the letter], [he] suffered injury in fact and lost money or property.” His second cause of action for intentional interference with prospective economic relations states “defendant[] engaged in wrongful conduct by” making the demands in the letter. And his third cause of action for declaratory relief avers defendant’s threat in the letter to sue him based on an alleged “non-compete agreement . . . violat[es] . . . California’s public policy that such agreements are largely unenforceable” and seeks a judicial declaration as to the validity of the agreement.

These allegations demonstrate the statements in the letter directly relate to a separate proposed lawsuit against plaintiff. The letter was sent to plaintiff and Rami, both of whom would have had a substantial interest in any potential litigation, and threatened to sue plaintiff and Rami if they did not cease and desist.

Plaintiff distinguishes *Neville* on the basis the employer there “carried through on a threat to file suit a mere four *months* after sending the letter . . . [while i]n this case, more than two *years* has passed and . . . [defendant] has not sued

[plaintiff]” But no “official proceeding” need actually have been initiated for section 425.16 to apply to prelitigation communications. (See *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [“letter seeking support for . . . petition to the Attorney General for an investigation of [the plaintiff’s] royalty payments to designated charities” held protected under section 425.16 as an “act in furtherance of its constitutional right of petition” despite being sent in preparation of lodging of complaint].) Rather, all that is required is that the subject statement be “made ‘in anticipation of litigation ‘contemplated in good faith and under serious consideration.’”” (*Neville, supra*, 160 Cal.App.4th at p. 1268.) Plaintiff’s “[f]ailure to provide an adequate record on [this issue by not including defendant’s moving and reply papers or providing anything to the court demonstrating the threatened litigation was not actually contemplated in good faith] requires that the issue be resolved against plaintiff.” (*Hernandez v. California Hospital Medical Center, supra*, 78 Cal.App.4th at p. 502.)

For the same reason, we disagree *Herzog v. “A” Company, Inc.* (1982) 138 Cal.App.3d 656 (*Herzog*) is more similar to this case than *Neville*. *Herzog* claimed his ex-employer “tortiously barred him from employment within his career field” when it wrote him a letter threatening to sue him and any competitor who employed him based on an “invention and secrecy agreement” that extended three years from the time employment was terminated. (*Herzog*, at pp. 657, 658.) Upon being shown the letter by *Herzog*, Ormco, a competitor, wrote a letter stating that ““had [it] not been for [ex-employer’s] letter . . . *Herzog* would have been hired as a consultant by Ormco.”” (*Id.* at p. 659.) *Herzog* sued ex-employer and ex-employer asserted the letter was privileged under Civil Code section 47. (*Id.* at p. 660.)

Contrary to plaintiff’s contention, *Herzog* did not find the litigation privilege inapplicable merely because defendant, through counsel, “threatened to sue to enforce an illegal restrictive covenant.” Rather, *Herzog* held that the litigation privilege was an “absolute privilege [that only applies] to communications made in pursuit of

litigation . . . *contemplated in good faith*” (*Herzog, supra*, 138 Cal.App.3d at pp. 660-661, italics added) and that the “letter facially exceed[ed] any legitimate purpose when it threaten[ed] Herzog and his future employers with suit based merely upon the fact of employment” rather than an actual violation of the contract’s restriction of disclosing “certain confidential matters related to [ex-employer’s] operations.” (*Id.* at p. 662.) *Herzog* concluded that a “communication not related to a potential judicial action contemplated for legitimate purposes” is not protected by the litigation privilege because it is not contemplated in good faith. (*Ibid.*)

Here, in contrast, defendant’s letter threatening suit was not based on plaintiff’s employment with Rami but on plaintiff’s solicitation of defendant’s clients and his disclosure of defendant’s proprietary matters related to its operations, i.e., its confidential customer list, which *Herzog* indicates is entitled to protection under the litigation privilege. Moreover, because plaintiff failed to provide a complete record, we cannot determine whether defendant contemplated litigation in good faith and thus resolve the issue against him. (*Hernandez v. California Hospital Medical Center, supra*, 78 Cal.App.4th at p. 502.)

Plaintiff argues prelitigation statements “are not protected when they constitute the furtherance of illegal activity,” citing *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*), overruled on another ground in *Equilon, supra*, 29 Cal.4th at p. 67. *Paul* held that the defendants in that case failed to satisfy the first prong of section 425.16 because “defendants’ campaign money laundering—was not a *valid* activity undertaken by defendants in furtherance of their constitutional right free speech.” (*Paul*, at p. 1365.) But it specifically noted that “conclusion is established by the factual record before us and is not really disputed by the defendants. Indeed, defendants argue that they are entitled to the benefit of section 425.16 in spite of such illegality.” (*Ibid.*)

But *Paul* went on to explain, that “had there been a factual dispute as to the legality of defendants’ actions, then we could not so easily have disposed of defendants’

motion. [¶] As we have noted, a defendant need only make a prima facie showing that the plaintiff's suit arises 'from any act of [defendant] in furtherance of [defendant's] right of petition or free speech' [Citation.] If the plaintiff contests this point, and unlike the case here, cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of defendant's acts is an issue which plaintiff must raise *and* support in the context of the discharge of plaintiff's burden to provide a prima facie showing of the merits of plaintiff's case. . . . [T]his is an *additional* burden which plaintiff must address. '[W]e believe this burden should be met in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law *or* by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.''' (*Paul, supra*, 85 Cal.App.4th at p. 1367.)

Here, a dispute exists "as to the legality of defendant[']s action" (*Paul, supra*, 85 Cal.App.4th at p. 1367) and defendant made the requisite prima facie showing plaintiff's action arose from an act in furtherance of defendant's right of petition or free speech. Accordingly, we address plaintiff's claim defendant's acts were illegal in connection with whether plaintiff satisfied his burden of establishing a probability of prevailing on his action.

3. Probability of Prevailing

Once a defendant has met its burden to show the complaint alleges acts arising from protected activity, the burden shifts to the plaintiff to make a prima facie showing of facts which, if proven, would support a judgment in the plaintiff's favor. (*Equilon, supra*, 29 Cal.4th at p. 67.) To satisfy this burden, "[t]he plaintiff cannot rely on the allegations of the complaint alone, but must present admissible evidence." (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45.) Plaintiff failed to do so.

Plaintiff asserts the May 17, 2010 letter was based on the illegal “non-solicitation agreements (and non-compete agreements)[, which] are absolutely invalid, unless they fall into one of the narrow statutory exceptions.” He relies on *Edwards v. Arthur Andersen, LLP* (2008) 44 Cal.4th 937 (*Edwards*), which concluded “[n]oncompetition agreements are invalid under [Business and Professions Code] section 16600 [(section 16600)] in California, even if narrowly drawn, unless they fall within the applicable statutory exceptions” (*Id.* at p. 955.) One of the exceptions to 16600 is “the so-called trade secret exception,” which *Edwards* did not purport to address, “as [the plaintiff] d[id] not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting [the defendant’s] employees violated section 16600.” (*Id.* at p. 946, fn. 4.)

“‘[A]greements designed to protect an employer’s proprietary information do not violate section 16600.’” (*Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1430 (*Thompson*)). Neither does “a contract which prevent[s] employees from raiding the[ir] former employer’s staff” or “an employee’s agreement not to disclose his former employer’s *confidential customer lists or other trade secrets* or not to solicit those customers.” (*Ibid.*) Antisolicitation covenants are also not void as unlawful business restraints “‘*where their enforcement is necessary to protect trade secrets.*’” (*Id.* at p. 1429, italics added.) After *Edwards* was decided, courts have held a former employee may be banned “‘from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer.’” (*Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 577, quoting *The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226, 1238.)

Here, plaintiff has not identified any language in the subject agreements that demonstrate they were illegal noncompetition or non-solicitation agreements, rather than agreements to protect defendant’s proprietary information. Nevertheless, we have independently reviewed the agreements to determine their validity.

The confidentiality agreement, which by its terms governed the terms of plaintiff's employment and no longer applied once plaintiff was terminated, required him not to disclose confidential and company-use only information, including customer lists, financial information, marketing strategies, and research and development strategies. That was a valid agreement designed to protect defendant's confidential information. (*Thompson*, 113 Cal.App.4th at p. 1430.)

The severance agreement is to the same effect. Under section 23 of the severance agreement, defendant promised:

(1) “. . . I will preserve as confidential all trade secrets, confidential knowledge, data, or other proprietary information relating to processes, know how, designs, formulas, computer programs, data bases, other original works of authorship, customer lists, business plans, financial information, or other subject matter pertaining to any business of the company or any of its employees, clients, consultants, or licensees.”

(2) “. . . for twelve (12) months from this date, to the extent permitted by law, I will not hire any employees of the company and I will not solicit, induce, recruit, or encourage any of the company's employees to leave their employment.”

(3) “. . . for (12) months from the date of execution of this agreement, and to the exten[t] allowed by law, I will not directly or indirectly engage in, (whether as an employee, consultant, proprietor, partner, director or otherwise) or have any ownership interest in, or participate in the financing, operation, management or control of, any person, firm, corporation or business that engages or proposes term of my employment, the company was engaged or proposed to later be engaged [*sic*]. The scope of this covenant shall be worldwide. I acknowledge that [defendant's] technology and products have worldwide application, including without limitation over the internet and that such scope is reasonable.”

Clause 1 is designed to protect defendant's trade secrets. (*Thompson*, *supra*, 113 Cal.App.4th at p. 1430.) This includes a defendant's confidential customer

list. (*Id.* at pp. 1429, 1430.) As *Thompson* explained, ““preferred customers are a real asset to [a] business and the foundation upon which its success, and indeed its survival, rests. It thus logically follows that a list of such customers is a valuable *trade secret*’ “[T]he list of customers, not ordinarily entitled to judicial protection, may become a trade secret, if there is confidential information concerning the value of these customers.”” (*Id.* at p. 1429) Under *Paul*, *supra*, 85 Cal.App.4th at p. 1367, it was plaintiff’s burden to show the agreement was illegal because the information was not confidential. He has not done so.

Clause 2 is a valid non-solicitation clause to protect defendant against plaintiff’s “raiding . . . [of defendant’s] staff” (*Thompson*, *supra*, 113 Cal.App.4th at p. 1430), which does not appear to be an issue. And clause 3 is simply unintelligible and thus unenforceable, notwithstanding its statement that it applies ““worldwide,”” as plaintiff points out. In any event, we agree with the trial court that “[t]here is no clause or language in the release that purportedly binds or attempts to bind [plaintiff] to a covenant or promise not to compete,” notwithstanding its reference to it being a “Severance Agreement, Non contact agreement, Non Compete agreement and release,” which “is simply surplusage to the ‘Severance Agreement and Release’ that both parties signed to end their relationship.”

Because plaintiff has not identified any illegal non-compete or non-solicitation provision in either the employment or the severance agreement referenced in the May 17, 2010 letter upon which he bases all three causes of action, he failed to meet his burden of showing a probability of prevailing on his action.

4. Attorney Fees

Because defendant’s anti-SLAPP motion was neither “frivolous or . . . solely intended to cause unnecessary delay” (§ 425.16, subd. (c)(1)), we deny plaintiff’s attorney fee request.

DISPOSITION

The order is affirmed. Defendant is entitled to its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.